Louisiana Law Review

Volume 45 | Number 2
Developments in the Law, 1983-1984: A Symposium
November 1984

Torts

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TORTS

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Bazley v. Tortorich[1] made way for an avalanche of tort litigation by employees who sustain injuries ordinarily covered by workers' compensation, but under circumstances in which the injury is one resulting from an allegedly intentional act of the employer or a co-employee. Bazley filed suit against an unidentified co-employee truck driver and against the driver of the car which ran into the garbage truck on which he was working, resulting in Bazley's injuries. The trial court dismissed the action against Bazley's co-employee as being barred by the worker's compensation statute. The court of appeal reversed the trial court on that count,[2] and was in turn reversed by the supreme court which held that Bazley's petition at best expressed a cause of action in negligence against his co-employee and hence could not be maintained under the "intentional act" exception to immunity under Section 1032.[3]

The supreme court opinion correctly stated that the meaning of intent in the term *intentional act* is that the defendant either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did.[4] The court properly differentiated a voluntary act from an intentional one by saying that "[t]he word *act* is used to denote an external manifestation of the actor's will which produces consequences. There cannot be an act subjecting a person to civil or criminal liability without *volition*."[5]

The supreme court opinion relies for its definitions upon Prosser,[6] the *Restatement (Second) of Torts*, and upon a comment to Title 14, Section 8 of the Louisiana Revised Statutes. In relying upon those authorities, the court wisely made instantly relevant the extensive jurisprudence and authority incorporated within those sources. In effect, the court adopted a rich, voluminous, and instant legislative history.

The traditional intentional consequences, such as battery, have posed no problem in the Louisiana jurisprudence in satisfying the requirements of "intentional act." The door that has been opened wide consists of the term "substantial certainty." What are the circumstances that would fail to qualify as a traditional intentional harm, (defined as the *desire*

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1. 397 So. 2d 475 (La. 1981).
2. Bazley v. Tortorich, 380 So. 2d 727 (La. App. 4th Cir. 1980).
3. La. R.S. 23:1032 (Supp. 1984).
4. 397 So. 2d at 481.
5. Id. (emphasis added).
6. W. Prosser, Handbook of the Law of Torts § 8, at 31 (4th ed. 1971).

to bring about the physical results of the act) but would be found to qualify under the "substantially certain" standard? What does the instant legislative history tell us?

In explaining the meaning of intent, the comment to section 13 of the *Restatement*, paragraph c provides that "it is immaterial that the actor is not inspired by any personal hostility to the other, or desire to injure him."[7] It is apparent that the physical consequences desired are the contact with the person of another. If that desired contact is consummated, then it is immaterial that no harm was intended if in fact the contact does inflict harm. Prosser himself emphasizes this distinction when he says that the tort is complete even if there is "not necessarily a hostile intent, or a desire to do any harm;" and it would make no difference if the defendant "has honestly believed that he would not injure the plaintiff. . . ."[8] Prosser went on further to say that the word "intent" is the word "commonly used to describe the desire to bring about the physical consequences, up to and including the death . . . ."[9] With the adoption of the *Restatement*-Prosser definition of intent as including "substantially certain" it is therefore clearly not required that the *injury* be desired, but only that the actor know or believe that the injury will be substantially certain to follow as a part of the physical consequences produced by the actor's conduct.

Is the standard of knowledge or belief objective or subjective? While the *Bazley* opinion interchanges the terms "know" and "believe,"[10] Prosser points out that where a *reasonable* man in defendant's position would *believe* that a particular result would follow, he will be dealt with by the court as though he had intended it.[11] Thus, it seems that Prosser advocates an objective standard for the knowledge or belief.

But in *Fallo v. Tuboscope Inspection*,[12] the supreme court specifically rejected the proposition that the "should have known" test would satisfy the state-of-mind element of the "substantially certain" standard. This raises the perplexing problem of distinguishing among the terms "know," "believe," "should know," and "what a reasonable man would know," and of determining what evidence is required to satisfy each term when it serves as an element of a burden of proof.

One is immediately aware that the cases defining the words "know" and "believe" are so diverse as to require a treatise for synthesis alone. Turning to conventional dictionaries, a fair consensus of the two definitions would be:

> know: to have cognizance, consciousness, or awareness of; to have within the mind as something apprehended, learned, or

7. Restatement (Second) of Torts § 13, comment c (1965).
8. W. Prosser, supra note 6, § 8, at 31.
9. Id.
10. 397 So. 2d at 481-82.
11. W. Prosser, supra note 6, § 8, at 32.
12. 444 So. 2d 621 (La. 1984).

> understood; to perceive directly to have direct unambiguous cognition of.
>
> believe: to accept or receive as genuine, valid or good; to be of the opinion.

We are favored with a *Restatement* definition of "should know."

> The words "should know" are used throughout the Restatement of this Subject to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.[13]

"What a reasonable man would know" is set out at length by Prosser as the foundation of negligence.[14] It seems logical to incorporate this analysis into Prosser's discussion of the meaning of intent when he said "where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it."[15] The knowledge that the law imputes to every reasonable man would thus be the foundation, not for a finding of negligence, but for a finding that a particular result was substantially certain to follow. For example, every reasonable man would know that detonating a charge of explosives will cause serious concussions, and if an individual is nearby, it is substantially certain that he will be injured. The relevant question then is whether it is acceptable judicial logic to hold that if the reasonable man would know, then in the eyes of the law this defendant did know.

How close does that reasoning move toward the "should have known" standard? It moves very close but still leaves a gulf that perhaps cannot be leaped without moving from intent to negligence. This leap would be a difficult one pragmatically because of the long association of the term with the negligence action. In another pragmatic sense, however, a consideration of the evidence that would satisfy the requisite standard, whether "know" or "should have known," may show that the gulf is more illusory than real.

Even if actual knowledge or belief is required, such a state of mind can be proved by circumstantial evidence; thus, even though an actor on the witness stand denies passionately that he knew or believed that certain consequences would follow from his act, circumstantial evidence such as the observations of other witnesses, the defendant's prior experience, experience common to the community, common knowledge of the physical properties of substances, and the probable consequences of

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13. Restatement (Second) of Torts § 12(2) (1965).
14. W. Prosser, supra note 6, § 32, at 157.
15. Id., § 8, at 32.

a chain of events could all be relevant in demonstrating that, despite his denial, more probably than not he knew or believed that the consequences were substantially certain to follow.

It is clear that no formal evidence need be introduced in proof of matters of common knowledge or of those subject to judicial notice.[16] The attributes of the reasonable man and matters of common knowledge may furnish a sufficient inferential base for the trier of fact to conclude that the actor knew or believed with substantial certainty, as Prosser observed. If this is true, then the practical difference at trial between "know" and "should know" is very slight.

The difficulty of precisely defining the relationship between intent, knowledge or belief of substantial certainty, and the physical consequences (including injury), caused considerable consternation among the practicing bar in the initial cases reported from the courts of appeal on the issues of whether the pleadings presented a cause of action. A number of cases were dismissed on the grounds that the allegations were not factual but conclusory as to the necessary state of mind, whether intent or substantial certainity, and therefore in contravention of our procedural fact pleading requirements.[17] Other opinions from the courts of appeal analyzed pleadings and found them to be sufficient in this respect.[18] The Louisiana Supreme Court in *Mayer v. Valentine Sugars, Inc.*[19] correctly pointed out that article 856 of the Louisiana Code of Civil Procedure provides that frame of mind can be alleged as such without violating the Louisiana rule against conclusionary pleadings, so that the words "substantial certainty" are sufficiently factual in stating an actionable degree of probability approaching intent so as to satisfy the requirements in that regard of the cause of action as stated in *Bazley*.

Lastly, what degree of probability is contemplated by "substantial certainty"? It is impractical to break the term down into a more specific statement. The jury should therefore be charged with that term itself, since its words communicate the notion of a high degree of probability.[20]

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16. McCormick on Evidence § 329 (E. Cleary 3d ed. 1984).

17. Buckbee v. Aweco, Inc., 418 So. 2d 698 (La. App. 3d Cir.), cert. denied, 422 So. 2d 166 (1982); Freeman v. Insurance Co. of N. Am., 413 So. 2d 692 (La. App. 3d Cir. 1982); Shores v. Fidelity & Casualty Co., 413 So. 2d 315 (3d Cir. 1982).

18. Quick v. Murphy Oil Co., 446 So. 2d 775 (La. App. 4th Cir.), cert. denied, 447 So. 2d 1074 (La. 1984); Weinnig v. Brown & Root, Inc., 428 So. 2d 1199 (La. App. 5th Cir.), cert. granted, 434 So. 2d 1099, reconsideration denied, 437 So. 2d 1136 (La. 1983); Hurst v. Massey, 411 So. 2d 622 (La. App. 4th Cir.), cert. denied, 413 So. 2d 900 (La. 1982).

19. 444 So. 2d 618 (La. 1984).

20. Bogard v. Cook, 586 F.2d 399, 411-12 (5th Cir. 1978), cert. denied, 444 U.S. 883, 100 S. Ct. 173 (1979); Jackson v. Brantley, 378 So. 2d 1109 (Ala. Civ. App. 1979); Vittum v. New Hampshire Ins. Co., 117 N.H. 1, 3, 369 A.2d 184, 186 (1977); Commonwealth v. O'Searo, 466 Pa. 224, 352 A.2d 30, 37 (1976); Pachucki v. Republic Ins. Co., 89 Wis. 2d 703, 707, 278 N.W.2d 898, 902 (1979).